

GODWELL NHAMO KHOSA
And
ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY (PRIVATE) LIMITED
And
CHRISTOPHERSON TENDEKAYI MUNDEMBE

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 18 July 2023 – 27 July 2023

Opposed Application

K. Choga, for the applicant
B. Mahuni, for the 1st respondent
T. K. Chamutsa, for the 2nd respondent

BACHI MZAWAZI J: This is an application for the vindication of rights in an immovable property known as No. 5 Schonland Close Mzari, Chinhoyi which is registered in the names of the applicant and his late wife. The 2nd respondent is in possession of the same without, the consent of the applicant with whom he has no contractual, legal or any recognised relationship with.

The brief narrative is that the applicant entered into a lease agreement with the 1st respondent a juristic entity on the 5th of March 2018. The terms and conditions pertaining to the renewal and termination of the lease were embodied in the lease which is part of the record. By mutual consent the said lease which had been renewed for a further two terms was supposed to expire on the 31st of January 2021. In the interim, the 1st respondent subletted the property in issue to one of its then employees, the 2nd respondent, in February 2019. Somewhere along the line the 1st and 2nd respondent's employment relationship soured resulting in the termination of the contract in 2019, of the same year.

It is not in dispute that applicant followed due process in terms of the notice and intention to terminate the lease with the 1st respondent. This culminated in the notice to vacate given to the 2nd respondent by the 1st respondent. Notably, the lease agreement between the applicant and the 1st respondent was also terminated by agreement. However, the 2nd respondent has refused to vacate the said premises despite the notices and all relevant actions

taken against him to do so. As a result, the applicant has approached this court on *actio rei vindication*.

It is the applicant's case that by virtue of the title deed in both his name and his late wife's name he has the right of ownership to the property in issue. His property is in the hands of the 2nd respondent who either has his consent nor any lawful right to be on the property. He wants him out. To support its case the applicant relied in the cases of *Nyahora VFC1 581/2014* and other cases.

The 1st respondent filed their opposing papers to contest the 2nd part of the applicant's claim on holding over damages and costs. In essence they are not opposed to the relief sought save the said damages and costs. They indeed admit that the leased premises was let to the 2nd respondent as part of his employment contract benefits. The contract of employment has since been terminated. As it were the 2nd respondent has no legal basis to remain onto a third-party property.

In opposition the 2nd respondent raises a preliminary objection of *res judicata*. They claim that the matter which is before this court has been heard before by a competent court. It is their argument that the same parties, the same dispute, or cause of action had been determined to finality in the Magistrates court. They aver that the applicant herein, instituted an eviction suit for their ejection in case number 384/20 Chinhoyi Magistrates Court.

In their viva voce argument, the 2nd respondent submit that the particulars of claim attached to the summons commencing action in the lower court as well as the draft order have been plucked and plugged to this application with minor variations pertaining to this court's procedures. It is the 1st respondent's prayer that this matter be dismissed on that ground alone.

Of note, however, the 1st respondent did not make any meaningful submissions on the merits. They did not deny that the basis of their stay on the property was the now defunct labour contract between themselves and the 1st respondent. They also could not dispute that the lease agreement between their former employer and the applicant had been lawfully terminated.

All they could say is that, their entitlement to the property is that they appealed against the termination of their employment contract and until such time the appeal is heard they will stay put.

On examination of the facts, law and evidence, the issues emanating from this set of facts are as follows:

- 1) Is the matter before this court *res judicata*?
- 2) Does the applicant have the right to institute action *rei vindicatio*?
- 3) Does the 2nd respondent have any defence on the *rei vindicatio* application?

Is the matter *res judicata*?

Res judicata is a legal concept that once a matter, case or dispute has been juridically resolved on merits between the same parties, by a competent court then it cannot be litigated again between the same parties. The term is of latin origins meaning “adjudged”. The rationale being that repeated re-examination of already adjudicated disputes is superfluous and does not serve societal interests. See *Banda and Ors-v-Zisco 1999 (1) ZLR 340 (5) at 3419*.

Three key components make up the test to determine whether a matter is *res judicata* or not. These are as highlighted in the case of *Mutsahuni and Anor-v-Minister of Lands, Agriculture, Fisheries, Water and Rural Resettlement and Anor HH 407-21* and *Banda and Others* above. These are, whether the matter was determined by a competent court, over the same subject matter or cause of action and a final decision was made on the merits. If a decision is made on technically which does not dispose the central issue then the principle of *res judicata* does not apply. See, *Muyambo-v-Beitbridge Rural District HH 9/21*, *Wolfenden-v-Jackson 1985 (2) ZLR (5)* *Kwandra-v-Mandebvu SC 12/2006*.

The 2nd respondent made unsubstantiated averments that the matter was definitively and conclusively determined on the merits. They did not attach the court record, let alone the judgment of the trial court to enable the court to see the definitive and finally essence of that judgment. They conceded that the application before the lower court was for eviction based on the termination of the lease agreement. They did not rebut the applicant’s assertion that the matter was dismissed on technicality as the applicant had no *locus standi* to evict the 2nd respondent firstly in the absence of the 1st respondent and secondly because applicant had no contractual relationship with the 1st respondent.

On assessment, it is accurate that the Magistrates court is a competent court. It is also clear on paper that the property subject to the Magistrates court case is the same as in this case.

What is in contradistinction is that the Magistrates court had only two parties cited. The 1st respondent was not a party thereto. Secondly, the dispute though centering around the same subject matter, has distinct causes of action. The first action in the Magistrates court was hinged on the termination of the lease agreement, whereas the present applicant is premised on the rights of an owner to vindicate his property from whosoever will be in its possession without his consent. Lastly, from the submissions of the parties, the rights of the parties over the property were not determined in the first case. That is the right of an employee to the employer's property after the termination of the employment contract. Therefore, the dispute was not dealt to finality. As such, this court is of the view that the dispute was not conclusively dealt with on the merits, between the three parties. As a result, the defence of res judicata fails.

During the course of the hearing the 2nd respondent raised a point of law, which at law is acceptable at any stage and time. They argued that the property in question was jointly owned by both the applicant and his now deceased wife. It follows that the wife or her estate should have been made part of the suit. On that basis, the applicant cannot vindicate his rights from the 2nd respondent so they argued.

This point was thwarted by the applicant's submission that from the onset the contract of lease which gave rise to the limited rights enjoyed by both the 1st and 2nd respondents was only entered into with the applicant. The co-owner, his wife was already out of the picture, as she had passed. In that regard, the applicant is entitled the *actio rei vindicatio* as any further explanation of the role will regate and nullify even the lease that was entered into in the first place.

This application simply illustrates that a drowning man will catch at a straw. At this stage of proceedings what is irrefutable is that the applicant is an owner of the property though in part. He is the one who entered into the lease agreement with the 1st respondent. Therefore, he can repossess the said property from any third party who is not sanctioned to possess it. The rights of the co-owner though important cannot diminish the right of the applicant to claim the property back and probably then work towards the interests of the deceased co-owners estate. See *Nyahora-v-CF 1 SC 81/201*, *Chetty-v-Naidoo 1974 (3) SA (3) SA13*.

On the merits, it is well settled law that once a contract of employment ends all rights that flow from that contract also falls away. Ordinarily, the employee does not have a right of

retention of company assets or property after termination of the contract. See *Forestry Commission-v-Betty Mawonde HH 9-113*;

“The law with regard to *rei vindicatio* particularly in the context of employment disputes is also trite. Once the applicant has shown that it is the owner of the thing, which still exists, is clearly identifiable and was in the respondent’s possession the onus is on the respondent to show the existence of a contractual right to possession. The right cannot exist where the contract is invalid or has been terminated. In that respect it follows that the jurisprudence in our jurisdiction is to the effect that an employment relationship once the employee is dismissed any benefits accruing from that employment cease to exist...An employee stands dismissed as long as the employer is not willing to reinstate him or her. For that reason, no right of retention of the property of the employer accrues to the employee as the contract remains terminated.”

It does not matter whether the matter has been appealed or not, the employee must relinquish possession of the former employer’s property. See *Savanhu-v-Colliery SC8-15*.

Interestingly, the 2nd respondent is well aware that property No. 5 Schonland Close Mzari, Chinhoyi does not even belong to his former employer but to a third party. That alone should have moved him to vacate the premises. It is even worse so, that there is no longer any relationship with the 1st respondent who had brought him into the picture. He thus has no legal entitlement to the property. He has no justification defence nor right. He must vacate the premises.

The applicant has succeeded to demonstrate that he is the owner and has the right to recover his property from the 3rd respondent with whom he had not authorised to stay on the same. This was highlighted in the case of *Savanhu* above as follows;

“The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent...The owner in instituting a *rei vindicatio*, need, therefore, do no more than allege and proxy that he is the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner (*Jeera-v-Minster of Lands 1958 (2) SA 380 (A) pp.*)”

As regards holding over damages, the applicant leased his property to derive a benefit in the form of the rentals. The 2nd respondent has been staying on his property without paying anything to him. This was not a charity arrangement. The 2nd respondent must not be allowed to be parasitic and ride on other people’s efforts and sweat. He has to pay holding over damages for all the rentals he was supposed to pay up to time he vacates the premises.

During the course of the proceedings the applicant withdrew his claim on holding over damages and costs against the 1st respondent. By mutual consensus the court granted the

application for withdrawal. Resultantly the applicant succeeds with costs against the second respondent.

It is ordered that:

1. The 2nd Respondent and all those claiming occupation through them, be and are hereby ordered to vacate Applicant's property known as certain immovable property situated at No. 5 Schonland Close Mzari, Chinhoyi within the next fourteen (14) days of the Order.
2. Should the 2nd Respondent fail to vacate the aforesaid property within fourteen (14) days of this Order herein, the Sheriff or/and his lawful Deputies be and is hereby ordered to take such steps as are necessary to evict the 2nd Respondent and all those claiming occupation through them.
3. The 2nd Respondent is liable to pay holding over damages calculated from the 1st of September 2020 at the rate of US\$20.00 or its equivalent at the auction rate for each day that the Respondents remain in occupation of the said premises, together with interest at the prescribed rate from the 1st of September 2020 to date of full payment.
4. That the 2nd Respondent is hereby ordered to pay the costs of this Application on the ordinary scale.